

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

SUMMONS FOR JUDGMENT NO.71 OF 2007

IN

SUMMARY SUIT NO.21 OF 2007

The Hongkong and Shanghai
Banking Corporation Ltd.

..Plaintiff.

Vs.

Ramnik Dunger Patel

..Defendant.

....

Mr. P.D. Ghandy with Ms. Sanidha Vedpathak i/b Maneksha & Sethna
for the Plaintiff.

Mr. M.L. Bansal i/b S.M. Poddar for the Defendant.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

2nd April, 2007.

P.C. :

1. On 8th May, 2002 an agreement of leave and licence was entered into between the Plaintiff and the Defendant by which the Plaintiff allowed the temporary use and occupation of residential premises admeasuring 550 sq. ft., located on the second floor of a building known as Samrat Co-operative Society at Bandra Reclamation to the Defendant. The term of the leave and licence agreement was for 11 months from 10th May, 2002 till 10th April,

2003. The compensation was fixed at Rs.8,500/- per month. Under Clause 4 of agreement, the Plaintiff as the licensee was required to deposit with the Defendant an amount of Rs.10 lacs by way of security. Under Clause 17, the licensee was to vacate and give charge of the premises to the licensor on expiry or earlier termination of the agreement. Clause 18 stipulated that the licensee at the time of vacating the premises would be entitled to the return of the security deposit within a week of such termination or earlier determination. If the licensor failed to return the security deposit within this period, the deposit was to carry interest at the rate of 18% per annum for the period of default / delay and the licensee would be entitled to reside in the premises without the payment of rent during such period.

2. On the expiry of the original agreement dated 8th May, 2002 a further agreement was entered into by the parties on 10th April, 2003 for a period of 22 months on the same terms and conditions. In exercise of the powers conferred by Clause 21 of the agreement, the Plaintiff by a letter dated 12th May, 2004 terminated the licence agreement and furnished one month's notice. The Defendant was

called upon to return the security deposit and to execute a letter taking possession of the flat, certifying that the accessories, fixtures and fittings were in order. This was followed by reminders dated 30th June, 2004, 21st July, 2004, 15th September, 2004 and 17th September, 2004. The Plaintiff has averred that it has always been ready and willing to hand over vacant and peaceful possession, but it was the Defendant who has failed and neglected to pay the security deposit till date.

3. The suit has been instituted under Order 37 of the Code of Civil Procedure 1908 for the recovery of an amount of Rs.14,11,781/- together with interest at the rate of 18% on the principal sum of Rs.10 lacs till payment or realization.

4. At the hearing of the Summons for Judgment, three defences have been urged on the maintainability of the Summary Suit. First and foremost it has been submitted that the Summons for Judgment has not been addressed to the Defendant, but to the advocate of the Defendant; that consequently the Defendant is

entitled to unconditional leave to defend. The requirement that the Summons for Judgment should be addressed to the Defendant is to be found in Form 11 appended to Rule 221 of the High Court (Original Side) Rules. The object thereof is to put the Defendant on notice of the claim against him in the Summary Suit so as to furnish the Defendant an opportunity to disclose his defence by applying for leave to defend the suit. In the present case, the Defendant has correctly understood the object and purpose of the Summons for Judgment as requiring him to disclose his grounds of defence in applying for leave to defend the Summary Suit. Absolutely no prejudice is shown to have been caused to the Defendant by the fact that the Summons for Judgment has been addressed to the advocate for the Defendant and not to the Defendant in person. The form in which the Summons for Judgment has been served complies in substance with the requirements of the law. As the Supreme Court observed in **Life Insurance Corporation of India v. Escorts Ltd.**¹ the requirement of a form cannot be given overriding importance. The second defence is that it is a mandatory requirement of Rule 221 (1) that the affidavit in support of the Summons for Judgment must

¹ AIR 1986 SC 1370.

state the deponent's belief that there is no defence to the suit. Here again, the Court must be guided not by the form but by the substance of the matter. The Plaintiff has in the affidavit in support of the Summons for Judgment inter alia relied upon the contents of the plaint. The Plaint contains an elaborate statement in regard to the terms of the leave and licence agreement and to the fact that though the Defendant was addressed several letters calling upon him to refund the security deposit, there was a failure and neglect on the part of the Defendant to do so though the Plaintiff was ready and willing to hand over the possession of the premises. This meets clearly the requirements of the law that the Plaintiff must in substance set out his belief that the deponent has no defence to the suit. Ultimately whether or not there is a defence to the suit is a matter for the Court to determine after considering the objections of the Defendant, if any. The belief of the Plaintiff is never final or conclusive nor for that matter is it a overriding consideration since it is for the Court to determine whether triable issues arise in the Summary Suit. In these circumstances, there is no merit in the second defence. The third defence is that in the suit interest has been claimed at the rate of 18%

per annum whereas in the Summons for Judgment interest was claimed at the rate of 21% per annum. In paragraph 7 of the rejoinder the Plaintiff has clarified that the reference to interest at the rate of 21% per annum in the Summons for Judgment is an inadvertent error and that in any event in the Summons for Judgment reference has been made to the claim for Rs.14,11,781/- in accordance with the particulars of claim at Exh. J to the Plaint. In Exh. J to the Plaint interest has been claimed at the rate of 18% per annum which is the rate at which the agreement between the parties provides that the Defendant would be liable to repay the amount of the security deposit in the event that it is not returned within a period of one week of the expiry / termination of the licence (Clause 18). The fourth defence is that the claim is in excess of Rs.10 lacs and that the Debt Recovery Tribunal would exclusively have jurisdiction under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. Section 17 of the Act empowers the Tribunal to exercise the jurisdiction, powers and authority to entertain and decide applications from banks and financial institutions for recovery of debts due to them. The expression 'debt' is defined in Section 2(g) to mean any liability

(inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium thereof during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application. A bank is defined by Section 2(d) to mean inter alia a banking company and a banking company is defined in Section 2(e) to have the meaning assigned in section 5(c) of the Banking Regulation Act, 1949. A banking company has to carry on the business of banking under the Banking Regulation Act, 1949. The expression “banking” is defined in Section 5(b) of the Banking Regulation Act, 1949 as follows :

““banking” means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft order or otherwise.”

The business of a banking company consists thereunder of accepting deposits from the public and granting credit and other facilities. In the Statement of Objects and Reasons the Bill took note of the fact that banks and financial institutions were experiencing considerable difficulties in recovering loans and enforcement of securities charged with them. Following the report of the Narasimham Committee an urgent need was felt to work out a suitable mechanism through which the dues of banks and of the financial institutions could be realized without delay.

5. Having regard to the definition of the expression 'debt' in Section 2(g), read in the context of the Statement of Objects and Reasons, there can be no dispute about the position that the object of setting up the Debt Recovery Tribunals was to ensure realization of the dues owing to banks and financial institutions, in the course of business activities undertaken by banks and by the financial institutions. These business activities would clearly have a reference to those in the context of banking business within the meaning of Banking Regulation Act, 1949. A suit by the bank for the return of a

security deposit advanced on an agreement of licence granted to the bank in respect of immovable property will therefore not be barred. The summary suit is therefore clearly maintainable.

6. Finally, it was urged that the Plaintiff is not entitled to a decree unless it were to hand over possession. The Plaintiff in its letter dated 12th May, 2004 made it abundantly clear that it was terminating the licence and called upon the Defendant to return the security deposit together with a letter taking possession and confirming that the accessories and fittings in the flat were in order. The Plaintiff has therefore clearly set up its willingness to hand over possession. Obviously it would be unreasonable to accept the Plaintiff in such a situation to first hand over possession and then take recourse to the remedy of filing a suit for the recovery of its dues against the licensor. The agreement contemplates that the licensee would be entitled to continue in possession until the security deposit is returned. The Plaintiff has averred in paragraph 3(xviii) that it has always been willing to hand over vacant and peaceful possession to the Defendant.

7. In these circumstances, the defence as disclosed does not raise any triable issue and the Plaintiff would be entitled to a decree as prayed. Counsel appearing on behalf of the Plaintiff tenders an undertaking to the Court on behalf of the Plaintiff that simultaneously with the execution of the decree that is to say, upon the Defendant paying the decretal amount, the Plaintiff shall hand over possession of the premises to the Defendant. Undertaking accepted. The suit shall accordingly stand decreed in terms of prayer clause (i).